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ALOM INDUSTRIES SDN BHD

v.

WONG HOANG CHIONG

B

HIGH COURT SABAH & SARAWAK, KUCHING
DAVID WONG JC
[SUIT NO: 12-45-2004-III (I)]
28 OCTOBER 2005

C ***CIVIL PROCEDURE:*** *Preliminary objection - Procedural and technical objection - Incomplete record of appeal - Whether there was injustice suffered by complaining party by procedural breach - Whether respondent prejudiced - Whether could be cured by invoking O. 1 r. 1A and O. 2 r. 3 of the Subordinate Courts Rules 1980 - Whether preliminary objection*
D *dismissed*

CIVIL PROCEDURE: *Appeal - Fact, findings of - Whether Sessions Court judge correct on finding of fact*

This was the appellant's appeal against the decision of the
E sessions court judge given after a full trial awarding the respondent the sum of RM99,546 being the price of works done and services rendered and dismissing the appellant's counterclaim of RM105,000. The facts were that the respondent was awarded a contract to construct a bituminous road (awarded contract) for a
F factory constructed by the appellant. In a letter dated 8 October 1997 the appellant ordered the respondent to stop work until further notice. After a period of one year, the appellant appointed another contractor to complete the construction works. On 12 May 1998, the respondent took legal action to recover for work
G done for stage 1, 2 and 3 which was resisted by the appellant on grounds that the three said stages were not completed properly. The respondent raised a preliminary objection herein that the record of appeal filed by the appellant was incomplete in that the witnesses' statements had been left out and only a draft order of
H the decision was attached to the record of appeal. The issue that arose was whether an incomplete record of appeal could be cured by the court by invoking O. 1 r. 1A and O. 2 r. 3 of the Subordinate Courts Rules ('SCR'). As to the crux of the appeal, the issues that arose were (1) whether the sessions court judge
I was correct in her finding that the respondent had completed

stages 1 – 3 of the awarded contract and (2) whether the sessions court judge was correct to conclude that the RM7,000 repair works were not necessitated or caused by the respondent. A

Held (dismissing the appeal):

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[1] There was no dispute that the draft order reflected the terms contained in written grounds of judgment which formed part of the record of appeal. It could not be said that the respondent was prejudiced by the draft order because it had known from day one that there was an appeal against the decision of the sessions court judge and the grounds were clearly stated in the memorandum of appeal. Order 1 r. 1A and O. 2 r. 3 SCR dictated that the court's focus should be on the merits of the case rather than worry about technicalities. There was no injustice suffered by the complaining party by reason of the procedural breach. At no time was the respondent misled by the appellant. (p 13 D-F)

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[2] The appellant's counsel had lodged the relevant papers to the High Court which contained two oversights. However, there had been substantial compliance with the rules. The infringements were not so serious such that they were a complete disregard for the rules. The use of witnesses' statements was a new approach to court trials. It was understandable that appellant's counsel assumed that the notes of proceedings provided by the court would include those statements. The counsel could not be fully faulted for his oversight as the court registry was responsible for preparing the notes of proceedings which should have included those evidences. The respondent had not suffered prejudice from this oversight. Thus, the preliminary objection of the respondent was dismissed. (p 14 A-D & H)

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[3] Having gone through the notes of the proceedings, the crucial evidences which tilted the scale towards the respondent were the evidences of DW4 (the substituted contractor) where in cross examination said that his works consisted repair works, premix and construction of the drain. The premix and construction of drain works were never done by the respondent as they were stages 4 and 5 of the awarded contract. By implication, stages 1, 2 and 3 had been

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completed by the respondent. The sessions court judge had not been wrong in her finding of facts as far as the completion of the works for stage 1, 2 and 3. (p 15 D-G)

[4] As to whether the sessions court judge had been correct to conclude that the RM7,000 repair works were not necessitated or caused by the respondent, this court could not find any reason to fault her decision. The appellant in its testimony through DW3 had maintained he had a consultant for the awarded contract. If that were so, it would have been easy to instruct the consultant to prepare a report of the respondent's work status when the awarded contract was terminated. This was not done and the fact that it took the appellant one whole year to appoint another contractor to finish the job painted a negative evidentiary picture of the appellant. If the consultant had made a report on the respondent's work status at the termination date, there would not be any dispute as to whether or not the works were completed. (pp 15 I & 16 A-C)

Case(s) referred to:

Chong Keat Realty Sdn Bhd v. Ban Hin Lee Bank Bhd [2003] 3 CLJ 532 CA ***(refd)***

Foo Sam Ming v. Archi Environ Partnership [2004] 1 CLJ 759 CA ***(refd)***

Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd [2003] 7 CLJ 457 HC ***(refd)***

Low Cheng Soon v. TA Securities Sdn Bhd [2003] 1 CLJ 309 CA ***(refd)***

Meganaway Enterprise Sdn Bhd v. Soon Lian Hock [2003] 5 CLJ 103 HC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. BBMB [2002] 1 CLJ 645 FC ***(refd)***

Nyana Pandithan v. Vettiveloo Kasinathan & Ors [1997] 1 CLJ Supp 30 HC ***(refd)***

Sematan Shrimp Hatchery Company v. Aqua Fresh Company [2005] 7 CLJ 505 HC ***(refd)***

UMBC v. Ernest Cheong Yong Yin [2001] 2 CLJ 31 CA ***(refd)***

Legislation referred to:

Subordinate Court Rules 1980, O. 1A r. 1A, O. 2 rr. 1, 3, O. 49 rr. 3A(1)(b), (d), (2), 6(3)(d)

For the appellant - John Shek; M/s John Shek, Sigar, Wei Yee & Co
For the respondent - KC Wong; M/s KC Wong & Assoc

Reported by Suhainah Wahiduddin

JUDGMENT

David Wong JC:

Introduction

This is an appeal by the appellant (defendant in the court below) against the decision of the learned Sessions Court Judge given on 3 November 2004 after a full trial. The claim of the respondent (plaintiff in the court below) was for the sum of RM99,546 being the price of works done and services rendered, RM46,860 being damages suffered by the respondent due to the wrongful stoppage of work by the appellant, interests and costs. The appellant had also counterclaimed against the respondent the sum of RM105,000 being the costs for rectification of the works done by the respondent. The learned Sessions Court Judge awarded to the respondent the sum of RM99,546 with interest of 8% per annum from 12 May 1998 (date of the summons) till full and final settlement and costs, dismissed the respondent's claim for damages of RM46,546 and also dismissed the appellant's counterclaim of RM105,000.

Briefly the undisputed facts are that the respondent was awarded a contract to construct a bituminous road (awarded contract) for a factory constructed by the appellant at its premises at Muara Tebas, Kuching by a purchase order dated 21 July 1997 issued by the appellant. The construction works were to be done in five stages. In a letter dated 8 October 1997 the appellant ordered the respondent to stop work until further notice. No notice came and instead the appellant after a period of one year appointed another contractor to complete the construction works. On 12 May 1998 the respondent took legal action in the Kuching Sessions Court to recover for work done for stage 1 and 2 amounting RM77,148.15 and stage 3 amounting RM22,397.85 making a total claim of RM99,546. For stage 1 and 2 constructions, the respondent subcontracted the same to one Quopuri Construction Sdn. Bhd. The appellant resisted the claim on the grounds that the works for stages 1, 2 and 3 were not completed properly and the cheque of RM77,148.15 was issued under duress of physical violence.

Preliminary Objection

Learned counsel for the respondent in his submission raised a preliminary objection which basically complains that the Record of Appeal filed by the appellant is incomplete in that the witness's statement of Philip Yiin Chung Leong, Chak Lee Yee and Ronnie Wong Kho Chung all affirmed on 24 March 2004 had been left out and only a draft order of the decision was attached to the Record of Appeal.

The respondent's preliminary objection concerns O. 49 r. 3A of Subordinate Court Rules (SCR) which states as follows:

> 3A. Appeal record where appellant is represented
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> (1) When the appellant who is represented by a solicitor has complied with the requirements of rule 2 of this Order, the appellant shall prepare the requisite number of copies of the appeal record and the record shall contain copies of:
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> (a) the relevant pleadings;
>
> (b) the notes of evidence;
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> (c) the grounds of judgment, provided that the absence of the grounds of judgment shall not prevent the appellant from proceeding with his appeal;
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> (d) the decision;
>
> (e) the notice of appeal;
>
> (f) all such documentary exhibits and other documents the parties shall consider relevant for the purposes of appeal.

There is no dispute that the appellant's counsel had not complied with O. 49 r. 3A(1)(b) and (d) SCR resulting in an incomplete Record of Appeal filed with the court.

Contentions Of Counsel

The crux of respondent's learned counsel's submission is that since there is an incomplete Record of Appeal, this court does not have the jurisdiction to hear it and attempt to remedy the situation by filing in a supplementary Record of Appeal and handing the court the sealed order of the decision is improper as they were done without the leave of the court. He relies on the case of *Sii Toh Sing v. Hung Ming Chung* [2000] 2 MLJ 204, the facts of which are quite similar to our present appeal in that the appellant there only included a copy of the draft order in the Record of

Appeal. The learned judge held that the word "decision" in O. 49 r. 6(3)(d) Subordinate Courts Rules 1980 can only mean a sealed judgment. Since the Record of Appeal did not have the sealed copy of the judgment, he held that the appeal record was incomplete; hence the court had no jurisdiction to hear the appeal.

The same issue arose in the case of *Nyana Pandithan @ M.G. Pandithan v. Vettiveloo Kasinathan & Ors* [1997] 1 CLJ Supp 30 where the learned judge puts the issue as follows:

> Whether an appeal record containing a draft judgment is sufficient for the purposes of O. 49 r. 3A(1) of the SCR and if not, whether or not the irregularity could be cured by the Court by invoking O. 2 r. 1 of the SCR.

The learned judge concurred with the view expressed in *Sii Toh Sing v. Hung Ming Chung (supra)* and held that O. 2 r. 1SCR could not cure the non compliance which he held was so fundamental that the court ought not to exercise its discretion to remedy it. In the learned judge's view to allow O. 2 r. 1 SCR to cure such a defect would make a mockery of the rules of procedure. Learned counsel for the respondent also relied on the case of *Low Cheng Soon v. TA Securities Sdn. Bhd.* [2003] 1 CLJ 309 and refers to p. 315 of the judgment which states as follows:

In our judgment, the importance of the Rules of Court cannot be ignored as otherwise the courts will be faced with endless problems involving the administration of justice. Speaking of the importance of the Rules of Court, the learned judge, Chang Min Tat J (as he then was) in *Yu Oi Yong & Anor v. Ho Toong Peng & Ors* [1977] 1 MLJ 120 had this to say (at p. 121):

> There should, in my view, be some adherence to the rules of court, unless required by circumstances, if there is to be any meaning or purpose in such rules.
>
> It should, I think, be realised by practitioners as well as by judges that while strict and slavish adherence to forms and rules can sometimes hinder the administration of justice, these forms and rules should not be disregarded for no reason whatsoever, since they embody the experience of the courts over the years in the cause of speedy and efficient administration of justice.
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> In *Chua Choong Yin v. Tan Boon Bak Trading Sdn. Bhd & Anor* [2002] 3 CLJ 357 the Court of Appeal was faced with similar issues. There the respondent raised two preliminary issues namely non-compliance by the appellant with:

(i) Practice Direction No. 3 of 1992; and

(ii) Rules 18(4)(c) and (6) of the Rules of the Court of Appeal 1994 ('the Rules').

Speaking through Siti Norma Yaacob JCA (as she then was) this is what the court said with respect to the first issue (at p. 363):

Whilst we appreciate that practice directions do not have the force of law, they are created for a specific purpose, namely to regulate a systematic and consistent procedure governing the filing of appeal records. For that reason they have to be adhered to otherwise chaos and uncertainty in the filing of appeal records shall prevail. See the cases of *Yeo Yoo Teik v. Jemaah Pengadilan Sewa, Pulau Pinang & Anor* [1996] 2 CLJ 628 and *Ling Siok Seng v. Ting Sieh Chung* [1998] 4 CLJ 169.

In dealing with the second issue the court there found that the appellant was in clear breach of r. 18(4)(c) of the Rules when he included in his appeal records two prohibited (under court order) exhibits. The solicitors for the first respondent, by letter, pointed out to the appellant that the inclusion of the said exhibits in his index of documents was in defiance of the court order but despite being put on notice, the appellant insisted on including the offending two exhibits and the fact of the first respondent's objection does not appear in the appeal records as required under r. 18(6) of the Rules.

The court there found that the appellant's refusal to acknowledge the objection was a clear breach of r. 18(6) of the Rules for which no explanation was forthcoming from him.

The court there upheld both preliminary objections and dismissed the appeal with costs.

Coming back to the instant appeal before us and for the reasons we have already mentioned earlier we would uphold the preliminary objection. We do so not because there is mere non-compliance with the Rules but rather because of the consequence which resulted from such non-compliance ie, a huge chunk of exhibits have been left out of the Appeal Record. Despite being informed by learned counsel for the respondent of his objection the appellant showed no response, an attitude which in our opinion amounted to a blatant disregard for the Rules. There was also no attempt made by the appellant to apply for leave to file a Supplementary Appeal Record. Such application, if made would have easily met our approval.

> Unfortunately nothing was done. We would therefore conclude that this appeal is not properly brought before us and on that finding we dismiss it with costs and order that the deposit be paid to the respondent to account of its taxed costs.

Respondent's learned counsel also refers to the unreported case of *Sematan Shrimp Hatchery Company v. Aqua Fresh Company* [2005] 7 CLJ 505. In this case the court was concerned with an incomplete set of the pleading ('plaintiff's reply' was left out) in the Record of Appeal and the attempt of the counsel to file a supplementary Record of Appeal by attaching it to his outline submission. The learned judge considered whether or not O. 1A and O. 2 r. 3 could cure the incomplete Record of Appeal and held as follows:

> In the light of what is stated above, I am of the view that even after the introduction of the amendment of O. 1A and O. 2 r. 3 of the SCR, before the Court can consider the merits of the appeal, the Appellant is obliged to file in his application for extension of time to file in the Supplementary Record of Appeal before the Court can exercise its discretion whether to grant the application or otherwise in the context of O. 1A and O. 2 r. 3 of the SCR. If the Court is to consider the merits of the Supplementary Record of Appeal without a prior proper application being made under O. 3 r. 5 of the SCR, it would be in my view again an abuse of the Court's process. In the circumstances as the Appellant has not made any application under O. 3 r. 5 of the SCR for extension of time to file in the Supplementary Record of Appeal, there is nothing for the Court to consider and since therefore there is no proper Record of Appeal before the Court, I allow the preliminary objection of the Respondent with costs to be taxed unless otherwise agreed.

Respondent's learned counsel based on the above authorities urged this court to strike off this appeal. He further said this court should not ignore the non compliance of the rules by the appellant because to do so would open the floodgate for lawyers to blatantly ignore the rules and bring chaos to the business of the court.

In reply to the respondent's counsel, learned counsel for the appellant in his written and oral submissions states that he had on 20 December 2004 written to the respondent's counsel and asked if he had any objection to the documents included in the Record of Appeal. When the respondent's counsel failed to reply, it was assumed by appellant's learned counsel that the Record of Appeal

was in order. He also contends that it was the duty of the respondent's counsel to extract the sealed order of the decision. In fact the signed copy of the draft order with amendment was signed, approved and returned back to the respondent's counsel. Nothing was done to extract the same until recently by either party. Further, he contends that at p. 168 of the Record of Appeal is a copy of the grounds of judgment which in itself indicated the decision of the learned Sessions Court Judge, hence there is no prejudice suffered by the respondent. As for the missing witnesses' statements, appellant's learned counsel explained that it was a mere oversight on his part as he had over the last thirty years in practice never used witnesses' statements and it did not occur to him to include those witnesses' statements as he assumed that the court registry would give him notes of proceedings which would include those witnesses' statements. To remedy his oversight, appellant's learned counsel without the leave of this court filed with the court registry a Supplementary Record of Appeal which contained the three witnesses' statements and handed a sealed copy of the decision to me on 20 October 2005 hearing. In any event, he contends that the respondent had not suffered any prejudice by the omission. Of course what the appellant's learned counsel is saying is this. Since the missing evidences and the sealed judgment are now before the court though improperly, the court should in the interests of justice deal with the merits of the appeal.

Decision On Preliminary Ojection

My decision on the preliminary decision solely depends on my construction of O. 1 r. 1A and O. 2 r. 3 SCR which read as follows:

> **Order 1 rule 1A. Court or Judge shall have regard to justice.**
>
> In administering any of the rules herein, the Court or a Judge shall have regard to the justice of the particular case and not only to the technical non-compliance of any of the rules herein.
>
> **Order rule 3 Preliminary objection for non-compliance of rules not allowed.**
>
> A Court or Judge shall not allow any preliminary objection by any party to any cause or matter or proceeding only on the ground of non-compliance of any of these Rules unless the Court or Judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

The issue before me then is:

> Whether an incomplete record of appeal could be cured by the Court by invoking O. 1 r. 1A and O. 2 r. 3 of the SCR.

The intention and rationale behind the introduction of O. 1 r. 1A and O. 2 r. 3 in 2002 are crystal clear and that is the courts should now deal with the merits of the case rather than to be unduly concerned with whether or not there is compliance with the rules.

Those intention and rationale are reflected in recent judicial attitudes. In *UMBC v. Ernest Cheong Yong Yin* [2001] 2 CLJ 31, the Court of Appeal was faced with a preliminary objection pertaining to the fact that the notice appeal was filed out of time. Ahmad Fairuz JCA (as he then was, now the present Chief Justice of the Federal Court) dismissed the objection and at p. 35 states as follows:

> Our Federal Court in the case of *Tan Chwee Geok & Anor. v. Khaw Yen-Yen & Anor.* [1975] 2 MLJ 188 at p. 189 said:
>
> The rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice. In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.
>
> But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.
>
> This changed attitude was reflected in the remarks of Lord Collins MR about 70 years ago in *Re Coles and Ravenshear:*
>
> > Although a court cannot conduct its business without a code of procedure, the relation of the rules of practice to the work of justice is intended to be that of handmaid rather than mistress; and the court ought not to be so far bound and tied by rules, which are after all only intended as general rules of procedure, as to be compelled to do what will cause injustice in the particular case.
>
> And in the same case Ali FCJ, said (at p. 192):

A The general principle, I think, is that rights of parties is an action are not to be defeated by technical objections In this connection we would also like to quote what this court had said in *Boustead Trading (1985) Sdn. Bhd. v. Arab-Malaysian Merchant Bank Bhd.* [1995] 4 CLJ 283, at p. 293 ie.:

B ... After all, courts exist to do justice according to the law as applied to the substantial merits of a particular case ...

Kaikaus J, in *Imtiaz Ahmad v. Ghulam Ali PLD* [1963] SC 382 at p. 400 said:

C Any system which by giving effect to the form and not to the substance defeats substantive rights is defective to that extent. The ideal must always be a system that gives to every person what is his.

D Bearing in mind the abovementioned authorities, I feel that the preliminary objection should not be allowed. The objection is indeed on a mere technicality. The notice of appeal had been filed anyway. Such procedural technical objection should not, in my view, be allowed to obstruct the process of giving justice to the E deservings by going into the substantive issues of the matters before the court. Hence we overruled the preliminary objection.

We also see the same sentiments expressed in the case of *Megat Najmuddin Dato' Seri (Dr) Megat Khas v. BBMB* [2002] 1 CLJ F 645, where the Federal Court through the late Tan Sri Mohtar Abdullah FCJ, said:

This was a clear case of where injustice had been done to the appellant who had been denied his right to have his appeal heard on its merit. This court had inherent powers to hear any G application to prevent an abuse of the process of the court ...

A judge should not be so besotted by the rules that his sense of justice and fairness becomes impaired because of his blinkered fixation on technicalities of the rules and the cold letter of the law ...

H The duty of the Federal Court, as the apex Court, to ensure that justice is done outweighs any procedural technicality preventing it from being done. When a case is brought before the Federal Court, the Court is so seized of the jurisdiction over the case. So seized, the Federal Court must decide the case in the interest I of justice, to redress wrong and uphold the right, uninhibited by the technicalities strewn in its path.

Of late we also see the same sentiments expressed in the Court of Appeal. In the case of *Chong Keat Realty Sdn. Bhd. v. Ban Hin Lee Bank Bhd.* [2003] 3 CLJ 532, Gopal Sri Ram JCA said:

> Lastly, there is the question of the modern approach to the breach of procedural provisions by a litigant. It is to be emphasised that the courts are concerned with the dispensation of both procedural and substantive justice according to the merits of a given case. So, when a party to litigation complains of breach of a procedural provision by his opponent, the primary question is not whether the particular provision is to be regarded as mandatory or directory according to the terms of the language in which it is couched. The correct question that the judicial arbiter should ask himself is this: What injustice has the party complaining suffered by reason of the procedural breach? It is the answer to this question that will ultimately determine whether the court should uphold or reject a procedural complaint.

We can see that the modern approach is not, in the word of late Tan Sri Mohtar Abdullah FCJ, a blinkered fixation on the rules. This approach is now embedded in O. 1 r. 1A and O. 2 r. 3 of both the Subordinate and High Courts Rules.

We also see this change of attitudes in our High Courts. In *Beauford Baru Sdn Bhd v. Gapala Krishnan VK Golpalan*, Low Hop Ping J held that mistakes of advocates are no longer fatal in whether or not to grant extension of time. This is a stark contrast to the old days where a simple advocate's mistake cannot be explained away, the consequence of which the merits of the case never got a look in. The primary focus now should be on whether or not substantial miscarriage of justice had occurred by a non compliance of the rules.

Also in *Meganaway Enterprise Sdn. Bhd. v. Soon Lian Hock* [2003] 5 CLJ 103 Low Hop Ping J was faced with a preliminary objection relating to non compliance with Form 18 in Appendix A to the Rules of the High Court and the failure to endorse the date of filing on the affidavit. The learned judge brushed it as aside in the following way:

> Without having to expend too much time and effort on these issues which are fraught with technicalities, I am of the view that the short answer is to be found in PU(A) 197/2002 which came into force on 16 May 2002, wherein comprehensive amendments were made to the Rules of the High Court 1980. O. 1A states that in administering any of the rules herein, the court or a judge shall have regard to the justice of the particular case and not only

A to technical non-compliance with any of the rules herein, while O. 2 r. 3 expressly says that a court or judge shall not allow any preliminary objection by any party to any cause or matter or proceedings only on the ground of non-compliance with any of these Rules unless the court or judge is of the opinion that such non-compliance has occasioned a substantial miscarriage of justice.

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See also the case of *Kosma Palm Oil Mill Sdn Bhd & Ors v. Koperasi Serbausaha Makmur Bhd* [2003] 7 CLJ 457.

I now apply those principles to the present case. Here the notice C of appeal had been lodged properly but unfortunately the Record of Appeal filed was incomplete for reasons stated earlier.

I deal first with the attached draft order. Both counsel confirmed in open court that there is no dispute to the terms of the draft D order though the form of the sealed order is different. There is no dispute that the draft order reflects the terms contained in written grounds of judgment which form part of the Record of Appeal. The sealed order was handed to me in open court on 20 October 2005. Can we then say that the respondent was prejudiced by E the draft order? Surely not, as the respondent knew from day one that there is an appeal against the decision of the Sessions Court Judge and the grounds are clearly stated in the memorandum of appeal dated 7 December 2004. Order 1 r. 1A and O. 2 r. 3 SCR dictates that the court's focus should be on the merits of the case F rather than worry about technicalities. Here I ask myself what injustice has the party complaining suffered by reason of the procedural breach. In my view there was none. At no time was the respondent misled by the appellant. In fact Mr. KC Wong submitted his detailed submission on the merits of the appeal from G the outset of this appeal.

I come now to the appellant's failure to include the three witnesses' statements in the Record of Appeal. To recap, appellant's learned counsel's excuse here is that he assumed that the court would have included in the notes of proceedings the H witnesses' statements as this is the first time he had used witnesses' statements in his thirty years legal career. This of course is not an excuse as O. 49 r. 3A(2) puts the burden on him. Is this mistake fatal for the appellant? In answering this I look at the whole circumstances of this appeal. We had a full trial in the I Sessions Court in which the appellant lost and wanted to and did appeal. Their counsel lodged the relevant papers to the High

Court but unfortunately contained two oversights which had been remedied though not according to procedures. There had been in my view substantial compliance with the rules and since the appeal is now before this court and if I sustain the preliminary objection, I would be letting the rules of procedures prevail over the merits of the case. The infringements in my view were not so serious such that they were a complete disregard of the rules. This court is aware that the use of witnesses' statements is a new approach to court trials and it is understandable that appellant's learned counsel assumed that the notes of proceedings provided by the court would include those statements which I emphasize are evidence in chief of defendant's evidence. Though he was responsible for the preparation of the Record of Appeal, he could not be fully faulted for his oversight as the court registry was responsible for preparing the notes of proceedings which in my view should have included those evidences. In fact Mr. KC Wong was not aware of this oversight until it was pointed out to him by me and of course provided him an additional bullet to his preliminary objection.

Again applying the 'prejudice' test, I find that the respondent had not suffered prejudice from this oversight.

I am aware that my decision is at odds with the judgment in *Sematan Shrimp Hatchery Company v. Aqua Fresh Company* [2005] 7 CLJ 505 in Kuching High Court. With respect and regret, I beg to differ to the principles stated therein. In *UMBC v. Ernest Cheong Yong Yin (supra),* the appellant had filed the notice of appeal out of time. There was no requirement for the appellant to apply for extension of time to file the notice of appeal. The Chief Justice of the Federal Court merely said and I quote "The notice of appeal had been filed anyway."

As for the case of *Low Cheng Soon v TA Securities Sdn. Bhd. (supra),* it is distinguishable to the present case. In that case there was a large chunk of exhibits missing from the Record of Appeal and counsel took no steps whatsoever to remedy it.

For the above reasons, I dismiss the preliminary objection of the respondent with no order as to costs. Let me say this modern approach to technical objections is a welcome one and I hope as time moves on we will see less judgments on procedure law and more of judgments on substantively law in our law journals.

Merits Of The Appeal

I now consider the merits of this appeal. In dealing with this appeal, I am of course guided by the principle that when an appeal concerns a finding of facts, an appellate court should be slow to interfere with the trial judge's findings as she had the advantage of seeing and hearing the witnesses. (see *Foo Sam Ming v. Archi Environ Partnership* [2004] 1 CLJ 759.)

With that principle at the back of my mind, I now examine the grounds of appeal. The crux of the appeal in my view is whether or not the learned Sessions Court Judge was correct in her finding that the respondent had completed stages 1-3 of the awarded contract. The appellant's learned counsel contended that the learned Sessions Court Judge's finding was flawed as she, inter alia, did not take into consideration of the evidence of DW3 and accepted the unreliable evidences of PW3 without just cause. Having gone through the notes of proceedings, the crucial evidences which in my mind tilt the scale towards the respondent are the evidences of DW4 (who was the substituted contractor) where in cross examination by Miss Ann Teo said that his works consisted of repairs works, premix and construction of the drain. Repair works were valued at RM7000. As for the premix and construction of drain works, they were never done by the respondent as they were stages 4 and 5 of the awarded contract. By implication stages 1, 2 and 3 had been completed by the respondent except that part of the work was allegedly not done properly. These evidences were taken into account by the learned Sessions Court Judge and in fact were treated as the icing on the cake as far as her analysis of the evidences was concerned. This is set out in the 1st paragraph at p. 173 of the Record of Appeal. As such I am of the view the learned Sessions Court Judge had not been wrong in her finding of facts as far as the completion of the works for stage 1, 2 and 3.

This then brings me to the question of whether or not the learned Sessions Court Judge was correct to conclude that the RM7000 repair works were not necessitated or caused by the respondent. Her reasons for her conclusion are set out in pp. 174-176 of the Record of Appeal. Again I cannot find any reason to fault her. The appellant in its testimony through DW3 had maintained he had a consultant for the awarded contract. If that were so, it would have been an easy thing to instruct the consultant to prepare a report of the respondent's work status when the awarded contract was terminated. Why this was not done and

why it took the appellant one whole year to appoint another contractor to finish the job paint a negative evidentiary picture for the appellant. If the consultant had made a report on the respondent's work status at the termination date, there would not be any dispute as to whether or not the works were completed. The learned Sessions Court Judge's conclusion that the road suffered wear and tear is also a reasonable one as there was no dispute that the appellant at that time were constructing its factory around the vicinity which involved traffics from heavy vehicles and piling works. The fact that the consultant did not do a status report of the respondent's work at the time of termination also leads me to the conclusion that allegation that the consultant's certificate is a precondition for payment was an afterthought.

The final matter which I need to address is the learned Sessions Court Judge's conclusion on the assault incident. Again I agree with her that the incident did not affect her findings of liability on the part of the appellant which were, as stated earlier by me, corroborated by the appellant's own evidences.

For the foregoing reasons, I dismiss this appeal with costs to be taxed unless agreed to the respondent.